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No. 92-1547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERSTATE COMMERCE COMMISSION,
Petitioner

v.

TRANSCON LINES, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION OF INTERSTATE COMMERCE COMMISSION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amicus National Small Shipments Traffic Conference, Inc., includes among its more than 450 members, individuals, small companies and major corporations. *Amicus* Health and Personal Care Distribution Conference, Inc. includes among its 70 members most major manufacturers of drugs, medicines and toiletries, as well as many smaller companies. Both *amici* (hereinafter "Shipper Conferences") are nonprofit membership corporations whose principal activities involve pursuing the interests of their members in their capacities as shippers of

[1] All parties to this case have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk of the Court.

freight, primarily via motor carriers subject to the provisions of the Interstate Commerce Act and regulations of the Interstate Commerce Commission (ICC) issued pursuant to that Act. Many members were customers of Respondent, Transcon Lines, prior to its bankruptcy.

The deluge of undercharge cases which has accompanied the bankruptcies of numerous motor carriers since enactment of the Motor Carrier Act of 1980 is well known to this Court. Shipper Conferences have been required to devote a major proportion of their resources to proceedings before the ICC and major cases before the courts concerning typical undercharge claims against shippers. Shipper Conferences participated as *amici curiae* in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and in *Reiter v. Cooper*, ___ U.S. ___, 113 S.Ct. 1213 (1993). In addition, the Conferences participated as *amici* in this case before the Ninth Circuit, and the undersigned participated in the oral argument before the court of appeals.

Shipper Conferences were the leading shipper parties in the ICC proceedings during the period 1986-1989 that led to adoption of the credit regulations at issue here, published at 49 C.F.R. Part 1320. Indeed, the provisions of the present regulations that the ICC adopted in order to *prevent* the result allowed under the decision below were adopted at the request of these Shipper Conferences and with the joint sponsorship of the trucking industry, acting through the American Trucking Association. See *Regulations for Payment of Rates and Charges — Penalty Charges for Nonpayment*, 5 I.C.C. 2d 691 (1989).

Many members of the Shipper Conferences have been made defendants against undercharge claims by bankrupt trucking companies based on the theory that loss of discount penalties for late payments can be imposed in clear violation of the ICC's credit regulations, several years after the bills were paid.

The Shipper Conferences support the ICC's petition for a writ of certiorari. Shipper Conferences represent a wealth of experience not just with the credit regulations at issue in this case, but also with the practical consequences for all freight shippers of the decision below. The purpose of this brief is to supplement the arguments of the ICC with a discussion, from the shipper community's perspective, of the need for review of that decision by the Supreme Court, and for reversal.

SUMMARY OF ARGUMENT

The portion of the decision below that is the subject of the ICC's Petition concerned claims for undercharges that Transcon filed against numerous shippers based on tariff provisions imposing a severe penalty for late payment of freight charges. Based upon a late payment provision in its tariff, Transcon seeks to collect the difference between the discounted tariff rates originally billed and paid and full undiscounted tariff rates. The latter rates are almost 100% higher than the rates billed and paid.

The ICC's credit regulations provided important safeguards to preclude a carrier from accumulating large sums of late payment penalties by not informing shippers of that liability and not promptly claiming the penalty, so that the shipper could avoid recurrences of late payments. The public protections built into the regulations included: a plain notice on any original freight bills subject to prospective penalty that the discount would be forfeited if not paid by a certain date; a requirement that the carrier rebill at the higher rate within 90 days; and a provision precluding accumulation of penalty charges for a series of bills for presentation in bulk.

Transcon's collection efforts, long after the fact and based on bills where late payment notices were not given, were found to violate the ICC credit regulations published at 49 C.F.R. § 1320. But the Ninth Circuit went on to hold that the ICC could not obtain an injunction against Transcon's violations of ICC

regulations because Transcon's filed tariff trumps those regulations. In so holding, the Ninth Circuit effectively deprived not just the ICC, but also thousands of shipper defendants, of their only effective remedy against claims which violate the regulations on their face. Moreover, because of its breadth, the court's holding has the effect of undermining all agency regulations, and public reliance on those regulations is now tenuous. By substituting the supremacy of any filed tariff over the ICC's regulations, the effects of this ruling, if not reversed, would be devastating.

The decision below is also objectionable because it conflicts with numerous rulings by other federal courts, including the Third and Fifth Circuit. As matters stand, the ICC's credit regulations are in effect in the Third and the Fifth Circuit, but not in the Ninth Circuit. Since the carrier brings the action and selects the forum, by adroit forum-shopping a carrier can flout the Commission's rules as to most shippers. The relationship between carrier tariffs and ICC regulations should be uniform nationwide.

Finally, the court of appeals has misread decisions of this Court dealing with ICC jurisdiction, the filed rate doctrine, and statutory powers invested in the ICC to control carrier credit practices. Under those decisions, the ICC is not powerless to remedy carrier violations of its regulations, merely because the carrier continues to supervene the regulations by crafting a tariff provision which purports to nullify them.

ARGUMENT — REASONS FOR GRANTING THE WRIT

I. This Case Raises Issues of Extraordinary Importance

Like *Reiter*, this case is a sequel to *Maislin*. *Maislin* and *Reiter* concerned undercharges based on the bankrupt carrier's attempt to substitute tariff rates for the unfiled rates the carrier formerly quoted and billed and the shipper had paid. In both

cases, this Court recognized the role of the ICC in assessing the reasonableness of the tariff rates on which the undercharges were based. This case, in contrast, involves a dispute over which of two sets of filed rates — discounted tariff rates, or the higher undiscounted tariff rates — should apply.

In the decision below, the Ninth Circuit rejected any role for the ICC in resolving the dispute, even though the ICC has clear statutory authority over tariffs and credit practices. The ICC had conducted a rulemaking and promulgated regulations pursuant to that authority, and was before the court of appeals under its statutory enforcement authority seeking to enjoin Transcon's violations of those regulations. The court below reached its result because of its belief, based entirely on its reading of *Maislin*, that the filed rate doctrine makes tariff provisions controlling even where the carrier violated ICC regulations governing credit penalties.

The decision below actually conflicts with *Maislin*, *Reiter* and other Supreme Court precedent, and with recent decisions on this very issue by other federal courts of appeals and district courts. Therefore, review by this Court would be warranted even if the decision were not such a dangerous precedent. However, the damage caused by the decision below, absent review and reversal, will be enormous. The Ninth Circuit's holding, that by a tariff provision a carrier can "trump" the agency's regulations and accomplish a result the regulations were designed to prevent, extends beyond this case and pervasively into the law governing administrative agencies in general. The mere thought that a regulated company can defeat an agency's regulations by a tariff provision is chilling.

Before discussing the broader implications of the Ninth Circuit's decision, Shipper Conferences point out that the adverse impacts of the decision are severe even in the context of this "one" bankruptcy case. Early in the Transcon bankruptcy proceedings, Transcon filed adversary proceedings against

340,000 former shippers, making Transcon's the broadest undercharge campaign in history in terms of its direct impact upon the shipping public.

There is no way for these Shipper Conferences to know how many shippers will be sued, or for how much, on the basis of Transcon's loss of discount for late payment penalty. The Ninth Circuit suggests that $15 million is claimed under this theory (ICC Petition, App. 3a), but this amount was as of a time prior to completion of Transcon's audit. Absent review and reversal, much of this $15 million, and much of any additional amount in similar claims Transcon has developed since 1990, is almost certain to be lost by shippers, despite the Ninth Circuit's finding (ICC Petition, App. 17a-18a) that Transcon violated the law.

To a shipper faced with claims for late payment forfeitures, mounting a defense means litigation, legal fees, and, in most cases, discovery. Pressures to settle, without regard to the validity of a bankrupt carrier's claims, can be irresistible, particularly for the small companies. Ordinarily, such defendants must look to the ICC for help against meritless undercharge claims, but the ICC's efforts in the case below were unavailing. Even *Chevron* deference was withheld. (ICC Petition, App. 18a.) In short, if claims like these cannot be resisted on legal grounds, specifically the ICC's credit regulations, they can rarely be resisted at all.

The adverse impacts of the decision below on Transcon's former shippers are compounded by the expansive nature of the Ninth Circuit's reasoning. It is difficult to think of a more egregious violation of ICC regulations. And yet Transcon, based on the Ninth Circuit's misreading of *Maislin*, stands to collect millions of dollars from shippers who paid the tariff rate they were originally billed.

The Interstate Commerce Act *prohibits* the extension of credit *except under regulations of the Commission*. 49 U.S.C.

§ 10743. Compliance with the regulations is thus a prerequisite, mandated by Congress, for *any* extension of credit. The specific regulations that Transcon violated were adopted for the express purpose of preventing credit provisions in carrier tariffs from becoming the trap for the unwary that Transcon has now sprung. Where the carrier notes its loss-of-discount penalties on its bills of lading and issues timely individual rebillings for the higher penalty amounts within 90 days after expiration of the authorized credit period, the shipper is put on notice of the penalty and of its failure to meet the specified payment date. If the shipper thus receives notice that it has paid a bill late, it can take corrective action and prevent the accumulation of a large penalty balance. The practical impact of the Ninth Circuit's decision is that a carrier can stand by and accumulate three years of bills before it goes bankrupt, without telling the shipper along the way that any payment arrived late.

Thus, this case does not involve a minor or inadvertent deviation from some technicality buried in the Code of Federal Regulations. As to all its shippers, Transcon consistently ignored *all* the key requirements of the regulations governing imposition of the additional penalty charges it seeks to collect. Yet the Commission's credit regulations were the sole basis under the statute for its credit-based billing practices. If such violations as these are permissible under the filed rate doctrine, *any* ICC regulation that implements the requirements of the Interstate Commerce Act is in jeopardy. What good is an agency's regulation if it can be rendered void by the carrier?

As a result of the Ninth Circuit's opinion, Transcon is certain to brush aside shipper defenses based on any violation of ICC regulations, whether those regulations concern credit penalties or any other aspect of its tariffs. Nor can the damage be confined to the *Transcon* case. Other bankrupt carriers will cite the Ninth Circuit's decision in support of the proposition that their tariffs, like Transcon's, bind all their former shippers,

notwithstanding any violations of ICC regulations they may have committed. The effect would be a "regulatory agency" whose regulations mean nothing.

Finally, it must be recognized that the filed rate doctrine does not apply solely to bankrupt motor carriers. It also applies to solvent motor carriers, to railroads, and even to tariff services outside the context of the Interstate Commerce Act. If *Maislin* can be extended to fields such as energy law and communications law that are also characterized by extensive federal regulation, it takes no great leap of the imagination to foresee efforts to extend the Ninth Circuit's erroneous interpretation of *Maislin* into other regulatory areas.

The extraordinary importance of this case warrants granting the ICC's Petition.

II. The Decision Below Conflicts with Numerous Federal Court Decisions

Transcon was not the first bankrupt carrier to file undercharge claims based on the alleged failure of its former shippers to pay freight charges within the tariff credit period. And, in light of the Ninth Circuit's decision, the number of such cases will increase exponentially.[2]

The leading case on the issue of violations of ICC credit regulations in an undercharge case involved The Mennen Company, a member of one of the Shipper Conferences. Asserting that the bankrupt carrier's claims were invalid due to credit rule violations, Mennen obtained referral of the issue to the ICC under the doctrine of primary jurisdiction; and the Commission found such violations to be unreasonable practices in violation of the Act. 1989 WL 239321 (I.C.C.). The District Court

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[2] Consider, as an example, a carrier which did not include late payment notices on any of its freight bills. Based upon ICC regulations, after going into bankruptcy it did not make any claims for forfeitures. But the Ninth Circuit has issued an invitation to resurrect all such claims.

subsequently granted summary judgment for the shipper, affirming the ICC's decision, and the Third Circuit affirmed in an unpublished opinion. *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd.* 919 F.2d 134 (3d Cir. 1990).

Summary judgment based on a similar ICC decision in *ADM of Mississippi, Inc.*, 1990 Fed. Carr. Cas. (CCH) ¶ 37,834 (1990 WL 287541 I.C.C.) was affirmed in an unpublished decision by the Fifth Circuit in *Delta Traffic Service, Inc. v. ADM of Mississippi, Inc.*, No. 91-1098 (5th Cir. 1992).

Though no other courts of appeals have addressed the issue, similar conclusions have been reached in numerous federal district court cases. See, *e.g., Delta Traffic Service, Inc. v. Purdue Frederick Co.*, 1989 Fed. Carr. Cas. (CCH) ¶ 83,508 (D. Conn. 1989) (referring the credit rules issue to the ICC and citing similar decisions in the District of Delaware and the District of Indiana). The ICC also addressed the credit rules issue, and found violations in cases referred by district courts in the Districts of New Jersey and Ohio. See the Commission decisions published at 1990 Fed. Carr. Cas. (CCH) ¶ 37,776 and 1992 Fed. Carr. Cas. (CCH) ¶ 37,951 (1991 WL 259987 I.C.C.).[3]

The most recent decision is *Lifschultz Fast Freight, Inc. v. National Manufacturing Co.*, 804 F.Supp. 1059 (N.D. Ill. 1992), the first post-*Transcon* decision dealing with undercharge claims involving penalties claimed in violation of ICC credit regulations. The court explained (804 F.Supp. at 1064):

> To hold as the court did in *Transcon* in effect renders meaningless all the conditions to an extension of credit in 49 C.F.R. 1320-29. The regulations outlined

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[3] A corporate affiliate of Transcon, a bankrupt carrier formerly known as PIE Nationwide, Inc., has filed 30,000 undercharge actions, a number of which involve loss of discount claims. One such case is pending before the ICC on referral by the district court. *Fidelcor Business Credit Corp. v. Dillard Department Stores*, No. 91-953-Civ-J-16 (M.D. Fla.) (referral order entered July 30, 1992).

> by the ICC pursuant to its granted authority must be complied with before a carrier can invoke a loss-of-discount remedy. Otherwise, the ICC is stripped of authority as granted by Congress in the Interstate Commerce Act.

The Ninth Circuit brushed aside the contrary decisions of the Third and Fifth Circuits, saying they were unpublished and concerned tariff penalty provisions adopted when ICC credit regulations did not permit such penalties. ICC Petition, App. 19a-20a. But this distinction makes no sense. Tariffs either supersede regulations or they don't. If absolute prohibitions against loss of discount penalties in the previous ICC regulations were controlling, restrictions on such penalties in the current regulations must also be given effect.

To date, the credit rules issue presented in this case has confronted three courts of appeals (two of which — the Third and the Fifth — have disagreed with the Ninth Circuit) and district courts in at least three other circuits. The pervasiveness and importance of the issue cannot be disputed. Nor can the need for uniformity on a federal question that only this Court can provide.

Because of clear and deepening conflicts among the courts of the various circuits as to an issue of nationwide importance, the ICC's Petition should be granted. Otherwise, the bankrupt carriers will be beating a path to the courts in the Ninth Circuit.

III. The Ninth Circuit Has Erred in Deciding an Important Question of Federal Law

Not only does this case have far-reaching impacts for carriers and shippers, operating under a federal system of regulation, but the Ninth Circuit's legal analysis is plainly erroneous.

The Ninth Circuit's decision cannot be reconciled with this Court's decision in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982). This Court

refused to allow a *judicially* created affirmative defense based on carrier violations of credit rules. However, the Court was careful to note the ICC's primary role in administering its credit regulations. See, *e.g.*, 456 U.S. at 351: "The remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper." And, as the ICC notes in its Petition, these remedies include "the power to seek a federal-court injunction requiring a carrier to comply with the regulations." 456 U.S. at 349, quoted in the ICC Petition at 14. This is precisely the relief the Ninth Circuit denied.

To the extent that there are differences between this case and *Commercial Metals*, they compound the Ninth Circuit's error. For example, in *Commercial Metals*, the Court noted that the regulations themselves did not provide that a carrier violation precluded collection. The current regulations do prohibit collection of *penalty* charges where the carrier has violated the credit rules. See, *e.g.*, 49 C.F.R. § 1320.2(g)(iii) and (vi). The first of these subsections states that the penalty "shall be applied only to the nonpayment of original separate and independent freight bills and shall not apply to aggregate balance-due claims sought for collection on past due shipments by a bankruptcy trustee, or any other person or agent." Subsection (vi) permits collection "only" where the 90-day rebilling requirement has been met.

It is also important to note that in *Commercial Metals* the shipper was trying to use the carrier's violation of the credit rules as an excuse for paying no freight charges to the carrier. In *Transcon*, freight charges have already been paid, and the issue concerns the carrier's desire to collect a penalty on top of those charges despite its violations of ICC regulations. *Transcon* is, therefore, akin to the double-payment cases that this Court recognized in *Commercial Metals* as an exception to the rule. 456 U.S. at 351. See also *Olson Distributing Systems, Inc. v. Glasurit America, Inc.*, 850 F.2d 295 (6th Cir. 1988), holding

the carrier equitably estopped in a double payment case where its delays in pursuing collection deprived the shipper of notice of the accumulation of charges and led to an escalation of the loss.

Of great significance here is this Court's recognition in *Maislin* of the ICC's primary jurisdiction over the reasonableness of carrier *practices*,[4] at least where the case turns on which of two filed rates is applicable, as this one does. See 497 U.S. at 129, n. 11:

> None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice has required departure from the filed tariff schedule altogether; instead, they have required merely the application of a different filed tariff. For example, in *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 86, 83 S.Ct. 157, 158, 9 L.Ed.2d 142 (1962), the Commission's finding that a carrier had engaged in an unreasonable practice by routing intrastate shipments over interstate routes

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[4] Numerous courts have recognized the propriety of referral of the shipper's defense to the ICC. These Shipper Conferences must therefore disagree with the statement in the ICC's Petition that a shipper cannot raise the carrier's violation of the credit regulations in defense of an action to collect the filed rate. Petition at 5. Under the circumstances that surround this issue, recognition of ICC primary jurisdiction is entirely consistent with *Commercial Metals*. As this Court noted then, "The facts of this case illustrate the problems that may arise when a court ventures to create law in this highly technical field." 456 U.S. at 350, n. 11. Those words are equally applicable now.

The Ninth Circuit's decision does not discuss *Commercial Metals*, but relies instead on *Maislin*. This reliance is misplaced. It is, of course, true that *Maislin* affirmed the continued vitality of the filed rate doctrine, even to the point of overturning, as violative of the statute, an ICC policy recognizing unfiled rates. But here there is no unfiled rate; both rates are filed, the discounted rate and the penalty rate.

> required only the application of a different filed rate, *i.e.*, the intrastate rates, rather than departure from the tariff schedule entirely. See also *Adams v. Mills*, 286 U.S. 397, 412, 52 S.Ct. 589, 593, 76 L.Ed. 1184 (1932) (reparations ordered constituted difference between one filed rate and another). Likewise, the cases in which the ICC has determined that a carrier engaged in an unreasonable practice by requiring a certain notation attached to the bill of lading to qualify the shipper for a reduced tariff also did not require deviation from the filed tariff. See *Standard Brands, Inc. v. Central R. Co. of New Jersey*, 350 I.C.C. 555 (1974); *Carriers Traffic Service, Inc. v. Anderson Clayton & Co.*, 881 F.2d 475, 481-82 (CA 7 1989) (collecting cases).

Under *Maislin* and *Reiter*, when a shipper asserts that a carrier's undercharge claims involve unreasonable practices (other than its simple failure to file an agreed rate) or unreasonable rates that violate the Interstate Commerce Act, the shipper is not required to pay the claims until it has obtained a ruling on the statutory unreasonableness issues from the ICC under the Commission's primary jurisdiction. Thus, under this Court's decisions (and those of many other courts that have considered credit rules issues in other cases) the filed rate doctrine cannot bar the Commission's exercise of its jurisdiction in an adjudication of reasonableness issues involving claims against an individual shipper.

Resort to the ICC is a cumbersome procedure to follow where a bankrupt carrier files thousands of collection actions and the violation of ICC regulations is undisputed. Recognizing the value of a direct enforcement action, the ICC filed a civil action under 49 U.S.C. § 11702(a)(4) to enjoin Transcon's

violations. Under *Commercial Metals*, its right to do so i unquestionable.[5]

In contravention of established law, the Ninth Circui decided to accord the tariff supremacy over ICC regulations The Ninth Circuit has misread *Maislin*. In order to correct th court of appeals' clear error of law, and to prevent irreparabl injury to Transcon's former shippers, to other shippers confront ing undercharge claims, and to the agency's statutory right t make enforceable regulations, this Court should review an reverse the decision below.

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[5] The Commission's authority to proceed by rulemaking is equally we established. See, e.g., *Rocky Mountain Motor Tariff Bureau, Inc. v. I.C.C* 590 F. 2d 865 (10th Cir. 1979), upholding ICC regulations nullifying speci residential delivery charges in carrier tariffs as an unreasonable practice.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the ICC's Petition, the ICC's petition for a writ of certiorari should be granted.

Respectfully submitted,

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